SUPREME COURT, U. S.

FILED

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No. 1097

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

JOHN BURTON MOODY, M. D.,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioner, John Burton Moody, M. D., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on January 27, 1967.

OPINION BELOW.

The Petitioner has twice been tried in the United States District Court for the Western District of Tennessee; in neither instance was an opinion of the District Court officially or unofficially reported. The opinion of the court

of appeals reversing the conviction of Petitioner upon his first trial is reported at 339 F. 2d 161 (1964). The opinion of the court of appeals on January 27, 1967 (App. p. 27)[1] is not yet officially reported; it is unofficially reported in 19 A. F. T. R. 2d ... (Case No. 67-367).

JURISDICTION.

The judgment of the Court of Appeals was entered on January 27, 1967 (App. p. 37). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

The Petitioner was indicted, twice tried and twice convicted, and his conviction at his second trial has been affirmed, upon an indictment charging willful evasion of less than $6550.00 in federal income taxes over a four year period, in violation of § 7201 of the Internal Revenue Code of 1954, 26 U. S. C., § 7201. As a matter of general reputation and notoriety in the district where he was tried, Petitioner is thought to be an abortionist. The questions presented for review by this petition are whether or not in justice or as a point of law this Court will sanction use by the prosecution of the common knowledge and belief in his community that Petitioner is an abortionist, and therefore is a marginal character for whom no juror should have sympathy, to obtain a conviction upon an indictment for tax fraud in a trial wherein:

1) The Internal Revenue Special Agent's investigation and disclosures to the jury utterly failed to meet the standards of industry and fairness set by this and other Courts for conducting and presenting such investigations;

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[1] "App." refers to the appendix to this petition; "R" to the Appellant's Appendix printed for use in the court of appeals.

2) The prosecuting attorneys victimized Petitioner by admonishing the jury to convict him because matters outside the record in this case made Petitioner appear to be so bad.

STATUTES INVOLVED.

No federal statute making abortion illegal under federal law was offered as applicable in this case. The statute alleged in all counts of the indictment is § 7201 of the Internal Revenue Code of 1954, 26 U. S. C., § 7201:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT.

The indictment charges Petitioner with willful evasion of $6547.45 federal income tax over the period 1956-1959. On conviction at his second trial Petitioner was fined $6000.00 and was sentenced to five-year concurrent sentences (R. 155a). The court of appeals, affirming the conviction, remanded the case to have the prison sentences reconsidered in light of the court of appeals' recommendation that, absent a prior felony record, sentences totalling less than half the sentences actually imposed would satisfy the federal interest in the violation of tax laws in the record. The court of appeals held:

1. There was no reversible error in the judge's charge to the jury nor in his refusal to give Petitioner's requested instructions.

2. The Internal Revenue Special Agent's investigation of Petitioner's case and presentation to the jury met the

requirements of **Holland v. United States**, 348 U. S. 212, by negating reasonable explanations by taxpayer inconsistent with guilt, tracking down leads reasonably susceptible of being checked which might establish taxpayer's innocence and fulfilled the Government's duty to see that justice is done.

3. Permitting the prosecuting attorneys to read into the record of the second trial testimony offered by a witness at the first trial, was a permissible use of hearsay testimony under the theory of "curative admissibility", Petitioner's attorney having earlier cross-examined the Special Agent about an affidavit submitted to the Special Agent by the witness in question.

4. Remarks in the prosecuting attorney's closing argument that, if the above-mentioned witness had been called by Petitioner, the prosecuting attorney could have proven "what I strongly suspect in this case" (R. 102a); that "this is one of the worst fraud cases—maybe not in amount because we can't prove everything we may think or feel or believe—but this is one of the worst fraud cases ever been here in this Court" (R. 105a); that the prosecuting attorneys had never had a case of this kind "which had any meaner angles to it than this case" (R. 107a), were not prejudicial to Petitioner, but might better have been left unmade.

Under the first holding by the court of appeals, that the charge and refusal to give requested instructions to the jury were free of error, this petition is directed to all parts of the charge and all refused instructions under the **Holland** rule, to the failure of the trial judge spontaneously to have corrected and rebuked prosecutors for their prejudicial arguments expressing their unproven beliefs and feelings about Petitioner, and to the confusion of terms in the charge with the result that the jury was instructed that willful tax evasion was shown if Petitioner failed to

report "taxable income" (R. 116a), or "income" (Ibid.), or filed a tax return on which "the proper income was not stated by the taxpayer" (R. 110a), or understated "the amount of gross income, amount of net income and the amount of tax due thereon" (R. 120a, 136a).

Before Petitioner was indicted the Special Agent in charge of this case received an affidavit reflecting cash loans by Eddie Adkins to Petitioner in the amount of $5000 during 1958 and $4000 during 1959 (R. 25a, 27a). These loans exceeded the alleged understatement of income by Petitioner in those two years (R. 4a, 5a). The Special Agent did not testify about such loans on direct examination when presenting the Government's case. On cross-examination the Special Agent admitted that he had received the affidavit about a year and a half before Petitioner's second trial, but had not made any attempt to locate persons who had been in the Army with Adkins, where he had won the money loaned to Petitioner, and had not contacted Adkins at all (R. 30a-31a). The Special Agent's complete disregard of the lead stated in the Adkins' affidavit about loans to Petitioner was stated by the trial court:

> "Mr. London (the Special Agent) testified that he did not make any attempt to run that down, didn't consider it in effect, didn't consider it a reasonable thing to do". (R. 48a).

During cross-examination of Petitioner's expert accountant, a former Internal Revenue Special Agent (R. 35a-36a), the prosecuting attorney was permitted to read at length from exhibits identified by and testimony of Adkins at Petitioner's first trial (R. 52a-65a). As one of the Government attorneys stated during the second trial, "Mr. Adkins is available as a witness in this case" (R. 21a).

REASONS FOR GRANTING THE WRIT.

1. In addition to errors in the charge to the jury or refusal to give Petitioner's requested instructions under the **Holland** rule and the failure to instruct the jury to disregard prejudicial remarks in the prosecutor's summation, the jury was instructed that tax evasion consisted of understating or omitting "taxable income", "income", "the proper income", "gross income, amount of net income and the amount of tax due thereon". Petitioner's requested instruction that tax fraud meant "the specific purpose to evade a tax believed to be owing," was refused (R. 140a).

This repeated one of the errors for which the conviction of Petitioner at his first trial had been reversed by the court of appeals (339 F. 2d 161).

The only evidence on which a conviction under Section 7201 may stand is proof that there was an attempt to evade **tax**; failure to report "income", "taxable income", "gross" or "net income" does not constitute willful tax evasion. To be free of reversible error the charge to the jury in a Section 7201 case must clearly distinguish between filing a false return, which does not evidence the offense charged under that code section, and proof of the specific, willful intent to evade **tax**, which is the Section 7201 offense, **Spies v. United States**, 317 U. S. 492.

It is error to instruct a jury in a tax fraud case that the failure to report income constitutes fraud, even where the jury should find that the omission of income from a tax return was conscious and intentional:

> ". . . Further, the court, after telling the jury that the attempt to defeat and evade the tax must be willfully and intentionally done, charged as follows:
>
> 'The presumption is that a person intends the natural consequences of his acts, and the natural pre-

sumption would be if a person consciously, knowingly, or intentionally, **did not set up his income** and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.' (Emphasis added.)

The appellant duly excepted to this charge. We think the exception was good and the giving of this charge was prejudicial error. The intent involved in this offense is not inherent in the act itself, but is a specific intent involving bad purpose and evil motive and that specific intent must be proved by or clearly inferred from the evidence."

Wardlaw v. United States, 203 F. 2d 884, 887.

On a broader basis the error in charging the jury in a Section 7201 case that the defendant's omission of known income from his tax return constitutes fraud, was described as follows:

"The attack on the charge to the jury is centered around those portions thereof which related to the question of intent, and appellant complains chiefly about expressions which have been discussed and disapproved in previous cases. See Spies v. United States, 317 U. S. 492, 63 S. Ct. 364, 87 L. Ed. 418; Hartman v. United States, 8 Cir., 215 F. 2d 386; Berkovitz v. United States, 5 Cir., 213 F. 2d 468; Wardlaw v. United States, 5 Cir., 203 F. 2d 884. Particular emphasis is placed upon remarks such as: '* * * If the defendant knew that he had enjoyed an income in excess of that reported and that he ought to pay the tax thereon, **obviously his failure so to do was willful** and for an evil purpose, and the **purpose was evil in that he wanted to escape and evade a tax** which he knew he was obligated to pay' (Emphasis supplied); and '* * * It would present a somewhat startling situation if the defendant, charged by law with the duty of filing a return, could sign and file a false return

made to defraud the Government and escape punishment by disclaiming knowledge of that which he was sponsored. * * * he must be held to know that which it is his duty to know, and which he solemnly promulgated; * * *.'

While we are of the opinion that the charge as a whole was so worded as to lessen the effect of the quoted remarks, yet we are constrained to hold their inclusion to be error for the reasons discussed in the cited cases. We realize it is difficult to construct a sound charge on the question of intent in such cases as this, where the specific intent must be inferred from circumstantial evidence of conduct, for it must give the Government full benefit of all such evidence and at the same time make clear to the jury the distinction between filing a false return and the specific intent to evade tax. Still, that distinction must be made, as pointed out in Spies v. United States, supra; and the inclusion of unequivocal remarks which amount to presumptions against the taxpayer must be avoided. If the evidence discloses circumstances from which honest mistake can be inferred as well as willful evasion, the charge should be expressed in such a manner as to make it clear that the jury is free to determine the question of intent either way in the light of those circumstances. We think there were such circumstances here and that the quoted remarks were prejudicial to appellant's chances of having the jury conclude he was ignorant of any understatement and therefore free of the specific intent required."

Vloutis v. United States, 219 F. 2d 782, 793-794.

The burden upon the government in a tax fraud case is to show additional tax due from a defendant and that this tax was intentionally evaded by him. Cases cited and relied upon by the court of appeals (339 F. 2d 161) when

reversing the first conviction of Petitioner fully illustrate this principle. One of them holds that,

> ". . . notwithstanding appellant may have fraudulently concealed **income** and may have done his best to cheat the Government, yet before he could be convicted it must be shown that **income tax was actually due** from the accused for the year involved. See United States v. Augustine, 3 Cir., 189 F. 2d 587, 589; United States v. Schenck, 2 Cir., 126 F. 2d 702, 704" (Emphasis added).
>
> **Holt v. United States**, 272 F. 2d 272, 279.

Another case cited by the court of appeals when reversing the conviction of Petitioner at his earlier trial states this same proposition as follows:

> "The prosecution was required to offer computations along the line that it did offer in order to show that full and proper returns would have resulted in larger tax obligations than those shown in the returns actually filed. If that fact were not shown, the return, however fraudulent, would not have resulted in the evasion of any income tax liability . . ."
>
> **Jones v. United States**, 282 F. 2d 745, 747.

Thus this case presents this anomaly: a confusion of terms and failure in the charge to the jury at Petitioner's first trial to make the distinction required by **Spies v. United States**, supra, and the above-cited cases constituted error which largely accounted for the reversal of that conviction (339 F. 2d 161); apparently on the reasoning that the same error committed a second time becomes harmless, the same confusion of terms and failure of required distinction in the charge to the jury at Petitioner's second trial was not reversible error.

2. The court of appeals' application of the requirements of the **Holland** case is in conflict with the meaning given

those requirements by the Ninth and Fifth Circuits and with the plain meaning of those requirements as expressed by this Court.

The Special Agent's testimony in this case about checking out the Adkins' Loans was summarized by the trial judge as being that "he did not make any attempt to run (the lead as to the Adkins' loans to Petitioner) down" because the Special Agent "didn't consider it a reasonable thing to do." The court of appeals' opinion in this case emphasizes the "reasonably susceptible of being checked" qualification placed by this Court in the **Holland** opinion upon leads which the Government must check, and concludes that this language somehow exonerates the Special Agent's failure to investigate the Adkins' loan to Petitioner, at all, citing a case decided four years before **Holland**. There is nothing in this record to show that this lead was not reasonably susceptible of being checked; the Special Agent did not contact Adkins at all and made no attempt to identify wartime companions of Adkins who might have corroborated the amount of Adkins' gambling winnings or other receipts while in the Army. The transcript of Adkins' testimony at Petitioner's first trial read into evidence at the second trial does demonstrate that, after Adkins loaned substantial sums to Petitioner in 1958 and 1959, Adkins made a number of loans and purchases on installment plans and the like, all of which were repaid or amortized as they became due (R. 59a-63a). The court of appeals' refusal to apply the **Holland** requirement upon the Government to check out and negate leads in this case is diametrically opposed to the purpose expressed by this Court in **Holland**, to afford tax fraud defendants this safeguard against the "serious injustice" which results from the Government's failure to follow, or, as here, a Special Agent's willful disregard of a lead as to the taxpayer's nontaxable source of funds.

The court of appeals' construction of the Government's obligations as to leads prescribed by the **Holland** rule is also in conflict with the recent view of the Ninth Circuit. In **Lenske v. United States**, ... F. 2d ... (18 A. F. T. R. 2d 5815), the Special Agent had conducted "a witch hunt". As in Petitioner's instance, the taxpayer Lenske had been victimized as part of an attempted "crusade to rid society of unorthodox thinkers and actors by using federal income tax laws and federal courts to put such people in the penitentiary." As a corollary to the Government's obligation to investigate leads under the **Holland** decision, the opinion in **Lenske** approves this comment by the trial judge in that case:

> "The Government is the strongest litigant in the world. You have got the F. B. I. and all the Government agencies available to you. You represent the strongest client in the world."

Because of the Government's power to investigate, unlimited resources and other advantages, the Ninth Circuit opinion perceptively describes the tax fraud defendant's plight as follows:

> "It would tax the imagination to conjure up a more frightening and frustrating situation than that in which his Government has placed this citizen."

On the point of particular pertinence here, that a Special Agent cannot legally exercise discretion, and thereby usurp the role and function of court and jury, as he does when he effectively decides a criminal case by disregarding a lead or conceals the results of his investigation, the view in **Lenske** is:

> "This attitude and conduct of the Government is in direct contradiction to the teaching of the Holland case, 348 U. S. 121. At page 132 the Court said, of the Government:

'. . . its failure to investigate leads furnished by the taxpayer might result in serious injustice.'"

Again at page 136 the Court said:

"'When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury.'

The Supreme Court could not have meant that if the Special Agent who follows up the lead produces nothing of advantage to the prosecution, what his investigation discloses becomes a government secret, inaccessible to the defendant, although what the Special Agent learned by the use of the Government's unlimited machinery of investigation might have been thought significant by a judge or a jury if they had been allowed to learn of it. The Court could not have meant that the Special Agent should be the tribunal empowered to decide criminal tax cases.

Under the Holland teaching, a lead not furnished by the defendant but discovered by the Special Agent in his investigation would have at least equal status with a lead furnished by the defendant. The philosophy of Holland is that the trial of a tax fraud case by the net worth method places a defendant at a disadvantage dangerous to his liberty, and that some departure from the gamesmanship tactics of ordinary trials, even other criminal trials, is necessary to compensate for the disadvantage and make the contest more nearly equal."

The court of appeals' application of the Holland rule is similarly in conflict with the view of the Fifth Circuit. In **Merritt v. United States,** 327 F. 2d 820, that Court construes the Holland opinion as requiring the Government to present its case by "listing or accounting for all assets of the taxpayer of which the Government is aware" either from its own investigation or from leads, because:

"To hold otherwise would defeat the requirement that the Government both check and negate leads furnished by the taxpayer:

> When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective **negation** of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. **This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government.** It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done. (Emphasis added.)

"Holland v. United States, supra, 348 U. S. at 135-136, 75 S. Ct. at 135, 99 L. Ed. 150. Not only should the taxpayer not be required to substantiate leads previously furnished the Government, but he also should not be required to substantiate the existence of assets uncovered by the Government in its own investigation. Even in civil cases, where there is a presumption that the Commissioner's determination is correct, once it is shown that his determination is

wrong, the burden of going forward with the evidence shifts to the Commissioner—there is no burden upon the taxpayer to show what is the correct determination. Grubb v. Commissioner, 6 Cir. 1963, 315 F. 2d 753, 759; Harp v. Commissioner, 6 Cir. 1959, 263 F. 2d 139."

Merritt v. United States, 327 F. 2d 820, 823.

There is no way the decision below may be reconciled with the letter or spirit of fairness of this Court's decision in **Holland**, or with the straightforward and apt application of same by the Ninth and Fifth Circuits in the above-cited opinions.

3. The court of appeals' justification of the hearsay evidence in this record, excerpts from the transcript of Adkins' testimony and exhibits at the first trial, is that "curative admissibility" permits same. As Petitioner's attorney repeated a number of times (R. 22a, 23a) the Adkins affidavit was referred to during cross-examination of Special Agent London for the single purpose of proving that the lead about loans to Petitioner totalling $9,000.00 had been received, but not checked out by that Special Agent. Upon the admission by the Special Agent that he had usurped the function and purpose of the Court and jury by deciding the lead was unreasonable, therefore to be disregarded, the **Holland** rule should have been applied to give Petitioner the protection this Court intended to provide tax fraud defendants.

There was no propriety in or basis for "curative" action for the Government's benefit, in any event. The affidavit made an exhibit in this record was produced by the Government's attorney and given to the Special Agent on redirect examination (R. 28a-29a).

Although Adkins was available to testify, the prosecution was permitted to examine Petitioner's expert witness

at length using selected excerpts from Adkins' testimony and exhibits at the first trial. The admission of such hearsay violated Petitioner's rights and privileges under the Sixth Amendment:

> "The charged denial of the right of confrontation: In respect of this right the substance of the guaranty of the Sixth Amendment is 'to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination.' Cf. Dowdell v. United States, 1911, 221 U. S. 325, 329-330, 31 S. Ct. 590, 55 L. Ed. 409, and see 5 Wigmore, Evidence (3rd ed. 1940), Sec. 1395."
>
> **Curtis v. Rives**, 123 F. 2d 936, 938.

The importance of Petitioner's right to cross-examine any witness whose testimony is used against him was fairly recently stated as follows:

> ". . . When cross-examination is involved, the defendant need not show that he would win his case if permitted the right denied him. '**Cross-examination of a witness is a matter of right** (emphasis supplied). * * * Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply.' Alford v. United States, 282 U. S. 687, 691-692, 51 S. Ct. 218, 219, 75 L. Ed. 624.
>
> In this case it is not necessary to rely solely upon the constitutional consequences of the trial judge's denial of cross-examination. The testimony adduced without benefit of cross-examination tends to enhance

the credibility of Grosz, even though it relates to a count of the indictment not now involved in this appeal. 'The right of a defendant in a federal court to confront the witnesses against him guaranteed by the Sixth Amendment, includes the right to test the truth of those witnesses' testimony by cross-examination.' United States v. Cardillo (2 C. A. 1963), 316 F. 2d 606, 610.

The judgment of conviction is, therefore, reversed."

Dixon v. United States, 333 F. 2d 348, 353-354.

This Court long ago held that the admission into evidence in a later hearing of testimony by a witness during a prior proceeding against the same defendant on the same charge violates the Sixth Amendment, even though the witness absent from the subsequent hearing had been cross-examined at the prior hearing, unless the witness dies before or is for other valid reason not available to the prosecution at the second hearing of the defendant. This general rule from a text source was quoted as follows by this Court:

"In his Treatise on Constitutional Limitations, Cooley, after observing that the testimony for the People in criminal cases can only, as a general rule, be given by witnesses in court, at the trial, says: 'If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there was a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party.' Cooley, Const. Lim. (2d ed.) 318."

Motes v. United States, 178 U. S. 458, 472.

After quoting a number of English cases this same opinion by this Court states the rule under the Sixth Amendment of the Constitution to be:

> "In the present case there was not the slightest ground in the evidence to suppose that Taylor had absented himself from the trial at the instance, by the procurement, or with the assent of either of the accused. Nor, if that were material, did his disappearance occur so long prior to his being called as a witness as to justify the conclusion that he had gone out of the state and was permanently beyond the jurisdiction of the court. His absence, as already said, was plainly to be attributed to the negligence of the prosecution. The case is not within any of the recognized exceptions to the general rule prescribed in the Constitution."
>
> Ibid. 178 U. S. 474.

In **Douglas v. Alabama**, 305 U. S. 415, this Court held Amendment VI violated where, the witness being on the stand but invoking his privilege against self-incrimination, his affidavit was read by the prosecuting attorney and its content was substantiated by law enforcement officers who took that witness' affidavit. The affidavit was not offered in evidence in the **Douglas** case. The Government's use of the Adkins affidavit and testimony from the first trial in the instant case is a more aggravated and prejudicial violation of said Amendment than was before the Court in the **Douglas** case.

4. The most prejudicial error of the Courts below was to permit prosecuting attorneys in their summation to refer to what they "strongly suspected" about Petitioner, to argue that no case ever had "any meaner angles to it" and that there was much against Petitioner outside the record because they could not "prove everything (they) may think or feel or believe."

The prosecuting attorney's obvious motivation in making these remarks was to take advantage of the fairly general belief about Petitioner's abortion practice, trusting that the jurors had gleaned as much about Petitioner before or during his extended tax troubles and attendant publicity.

Petitioner's attorney made no immediate objection or motion for mistrial upon hearing these flagrant, inflammatory statements because, as the trial judge noted, that could only have accentuated those remarks (R. 135a), and because the trial judge ought to have corrected these abuses of Petitioner's rights sua sponte:

> ". . . It will suffice to say of the second specification of error that, though the argument of the United States Attorney was not objected to, it did go unadmonished and uncorrected so far out of bounds as to put the district judge in error in not, of his own motion, admonishing the Government's counsel to desist from that kind of argument and directing the jury that the argument was incorrect and unfair, and that they should not consider it . . ."
>
> **Steele v. United States**, 222 F. 2d 638, 641, cert. den. 355 U. S. 28.

Cases have frequently been reversed because of excess zeal on the part of government's attorney in argument to juries, even though no immediate objection was made to such argument by the defendant. The general principle requiring such reversals is stated by this Court in **Viereck v. United States**, 318 U. S. 236, 248. This fundamental principle has been applied whenever the improper argument by government's attorney works real prejudice upon a defendant:

> "Since the testimony which the prosecutor denounced as perjurious was the cornerstone of the

defense of insanity, his improper conduct was so prejudicial as to constitute the type of error for which we have a duty to reverse though the point has not been raised by the parties.

This is the second reversal of appellant's conviction of this crime. 'But the standards of justice cannot be relaxed in such a situation; the fact that an accused has undergone more than one trial does not dilute his right to just and lawful treatment. See Leyra v. Denno, 1954, 347 U. S. 556, 74 S. Ct. 716, 98 L. Ed. 948.' Caldwell v. United States, 1955, 95 U. S. App. D. C. 35, 38, 218 F. 2d 370, 372 (Judge Washington, dissenting)."

Stewart v. United States, 247 F. 2d 42, 47.

"We recently reversed the conviction of a defendant upon a narcotics charge for a much less offensive statement than the one involved here, Nalls v. United States, 5 Cir., 1957, 240 F. 2d 707, and authority is not wanting for enforcement of the fundamental rules of fairness even where no exception is taken to the argument.

We hold that this statement of the prosecuting attorney constituted 'plain errors * * * affecting substantial rights' under Rule 52 (b), 18 U. S. C. A., governing criminal procedure. It was such an error, also, as would have been magnified in its influence on the jury by an objection and motion for mistrial. It made it so unlikely that the appellant could be given a fair trial, as the term is understood in our jurisprudence, that we hold it to be reversible error . . ."

Ginsberg v. United States, 257 F. 2d 950, 955.

"We quite agree that 'counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the

first time on the point that the comments to the jury were improper and prejudicial'. United States v. Socony-Vacuum Oil Co., 1940, 310 U. S. 150, 238-239, 60 S. Ct. 811, 851, 84 L. Ed. 1129. That text continues, however:

> 'Of course appellate courts "in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings". See United States v. Atkinson, 297 U. S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555. 310 U. S. at page 239, 60 S. Ct. at page 851.'

There is an excellent and full discussion of the subject in the majority and dissenting opinions of the D. C. Circuit in Stewart v. United States, 1957, 101 U. S. App. D. C. 51, 247 F. 2d 42, and Judge Cameron has ably dealt with the subject for our Circuit in Ginsberg v. United States, 1958, 257 F. 2d 950. Further elaboration in this opinion is, we think, superfluous.

A mere reading of the improper argument demonstrates that it is so extreme and so plainly eroneous as to seriously affect the fairness of the trial and the substantial rights of the defendants. See Rule 52 (b), Federal Rules of Criminal Procedure, 18 U. S. C. A. The judgment is therefore reversed and the cause remanded for a new trial.

Reversed and remanded."

Wagner v. United States, 263 F. 2d 877, 884.

The summation by prosecuting attorneys in this case violated the basic obligation of a prosecuting attorney. The reasons why a prosecutor must comply with and

honor such obligations if a defendant is to have a fair trial were stated as follows by this Court:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none . . ."
>
> **Berger v. United States**, 295 U. S. 78, 88.

These arguments violated Rule 15 of the American Bar Association's Canons of Professional Ethics by the expression of the prosecuting attorneys' personal suspicions, thought, feelings and beliefs about the case. Such statements would have been unethical even if based on testimony in the record; in this instance the personal feelings and beliefs were argued to the jury on the basis of what the prosecuting attorneys knew or suspected or believed

coupled with the assertion that "we can't prove everything we may think or feel". The reasons for enforcing Canon 15 have been stated as follows:

> ". . . To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon to be elemental and fundamental. See also 1 Bishop, New Criminal Procedure, Section 293 (2d ed. 1913); 6 Wigmore, Evidence, Section 1806 (3d ed. 1940).
>
> **Greenberg v. United States**, 280 F. 2d 472, 475.

In reference to the prejudice wrought when a United States Attorney injects his own view of the case into argument, it has been noted that this is particularly bad where the view expressed is that the case being argued is the worst tried in a given District:

> "In the instant case 'zeal outran fairness' in our judgment. At the outset, the jury was told that in the prosecutor's opinion the case was the most flagrant he had ever tried and was replete with fraud. At this point, it would have been relatively simple for the Court to have discharged the jury who heard the prejudicial remarks and impaneled another one. It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not

in evidence, and not part of the evidence to be presented; or to make unwarranted inferences or insinuations calculated to prejudice the defendant. Taliaferro v. United States (9 Cir. 1931), 47 F. 2d 699."

Dunn v. United States, 307 F. 2d 883, 885-886.

CONCLUSION.

This case is another example of the now long line of cases wherein tax fraud prosecutions are used to prosecute individuals because of the Government's inability to prosecute the same individuals for offenses those individuals are popularly believed to have committed. A fairly early example of this sort of case involved a tax fraud prosecution to incarcerate one widely believed to be guilty of malevolent political bossism, **United States v. Pendergast**, 28 F. Supp. 601. With the enactment of federal wagering tax laws in 1951 the emphasis in publicity given this use of tax fraud prosecutions was shifted onto individuals notorious in the public mind as leaders, and some followers, in gambling or crime syndicates, **Treasury Department Press Release, H-250** (1953). This use of tax fraud prosecutions, against individuals who could not be indicted for whatever offenses they had committed according to credulous popular belief or unsupportable official conclusion, had by 1963 increased to the point that the following thumb nail sketch of the Internal Revenue Intelligence Division is contained in a book issued by one of the leading publishers in the tax field, after a laudatory Foreword by then Commissioner of Internal Revenue, Mortimer M. Caplin:

"In the forty-three years of its existence, the Intelligence Division has become known as one of the most dynamic and effective federal law enforcement agencies. Its agents have been popularly called 'the

giant killers' for their success is bringing to book on tax charges notorious violators of other laws, many of whom seemed at times to be beyond the reach of all authority."

Prentice-Hall, The American Way in Taxation 187 (1963).

This increasing use of tax fraud prosecutions to snare individuals publicly or officially considered objectionable, but found to be otherwise legally unassailable, was apparently not considered by Louis Eisenstein a gambit appropriate for inclusion within the title he chose for h well-respected analysis of our tax system, **Eisenstein, The Ideologies of Taxation** (1961). While we agree that this was a necessary exclusion from a work bearing that title, this petition does not seek to have this Court eliminate or even criticize this long-standing use of tax fraud prosecutions, so long as the defendant is in fact and in law guilty of tax fraud according to the record in his cas

By this petition it is submitted that a tax fraud investigation is an even more potent weapon than the *nota censoria* of ancient Rome so that, if the Intelligence Division is to be accorded the kind of all-pervasive authority no popular government has openly condoned since the extinction of the Censors of ancient Rome, witch hunts or worse will be prevented only by strict enforcement of objective criteria.

In this case criteria properly considered objective by any standard were not observed. The potential for injustice inherent in the almost total lack of comprehension by a lay jury of the complicated accounting devices and methodolgy of tax fraud prosecutions, presented through an opinionated but nonetheless able expert for the Government, was recognized by this Court in the **Holland** decision. The fearful array of investigative agencies which

are marshalled in fact or in threat by the Government, not only against the taxpayer under investigation or indictment, but also against all persons used by a Special Agent to build his case, was judicially noticed by both the trial and appeals court in the **Lenske** case.

These were the forces working to the prejudice of the Petitioner: the necessarily uninformed acceptance of the Government's accounting machinations by the jury and the Government's tremendous potential for compiling the puzzle with pieces obtained from persons under automatic and understandable duress. The injustice Petitioner suffered in this case was bound to result when the **Holland** safeguards upon tax prosecutions' accounting contrivances were ignored, as they have been here, and when the prosecution was permitted, without correction by the trial court, to obtain conviction by reminding the jury of those aspects of the Petitioner's reputation, or another "mean angle" the jurors might have learned by rumor, gossip or any other source outside this record, which made this the "worst" tax fraud case in local history. This petition does not attack this use of a tax fraud prosecution against one widely believed and thought in his community to be an abortionist, because of such use. By this petition this Court is asked to review this matter and to determine that this is a tax fraud conviction obtained because, and only because, Petitioner is generally held in his community to be a marginal character for whom a jury should not exercise sympathy. If tax fraud prosecutions are to continue, with this Court's permission, to be used to rid a community of unsavory characters against whom convictions are not otherwise attainable, it seems imperative to require that those unsavory characters be also found guilty of tax fraud in a fair trial on that issue, in which the defendant be accorded the safeguards established by this and other courts. This imperative minimum requirement was not met in this case.

Because of this important question of individual rights and the existing conflict of decisions safeguarding same, this petition for certiorari should be granted.

Respectfully submitted,

LUCIUS E. BURCH, JR.,

TOM MITCHELL, JR.,
Attorneys for Petitioner.

APPENDIX.

APPENDIX "A".

Filed Jan. 27, 1967, Carl W. Reuss, Clerk.

No. 16862

United States Court of Appeals
for the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. John Burton Moody, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided January 27, 1967.

Before: Edwards and Celebrezze, Circuit Judges, and Kalbfleisch,* District Judge.

Edwards, Circuit Judge. Appellant has twice been tried and convicted before a jury in the United States District Court for the Western District of Tennessee on a four-count indictment charging willful evasion of federal income taxes in violation of the Internal Revenue Code of 1954, § 7201. On appeal to this court, the previous conviction was reversed. *United States v. Moody*, 339 F. 2d 161 (1964). This court held that defendant had been denied the right to introduce evidence pertaining to, and had been denied an instruction on, his claim that he owed no additional taxes for the disputed years.

On retrial and reconviction defendant was again sentenced to five-year concurrent sentences on each of the

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* Honorable Girard E. Kalbfleisch, United States District Judge for the Northern District of Ohio, sitting by designation.

four counts. On this appeal defendant complains of many aspects of the judge's charge to the jury. He also claims prejudicial error in several comments to the jury made by government counsel during closing arguments. And he likewise complains of the admission of hearsay evidence at the second trial by dint of cross-examination of a defense witness pertaining to what had happened at the first trial.

Defendant is a medical doctor in private practice in Dyersburg, Tennessee. The indictment alleged (and proofs showed!) that defendant filed a tax return for the year 1956, showing $2,584.90 taxable income, and no federal income tax due; for the year 1957, showing taxable income of $3,639.64, and tax due of $53; for the year 1958, showing taxable income of $2,019.80, and tax due of $403.96; and for the year 1959, showing taxable income of $2,119.06, and tax due of $423.81. The indictments also charged that defendant knew his taxable income and tax due in those same years was 1956—$6,503.73 and $1,350.82; 1957—$5,079.42 and $1,037.47; 1958—$8,576.59 and $1,829.91; and 1959—$13,633.39 and $3,210.02.

As we have noted, the jury at this second trial found defendant guilty on all four counts. No issue pertaining to the sufficiency of the evidence to uphold this verdict is presented to us. But it seems essential to us in dealing with the legal and procedural problems which are advanced to note both the essential nature of the evidence from the prosecution and the essential nature of the defense.

The chief prosecution witness, a special agent with the Intelligence Division, Internal Revenue Service, made an analysis of the checking account operated during these four years by defendant. After adding the known items paid by defendant in cash during those years and deducting all deposits which were of a non-income nature, he

arrived at the total taxable income for each year previously noted in the indictment. These proofs showed $33,793.13 of taxable income for the four years in question, whereas defendant's returns for those years showed a total of $10,363.40. As far as we are able to deduce, these totals are not in dispute in this appeal—nor apparently were they at the end of the trial.

Secondly, the prosecution produced witnesses who testified to the amounts actually paid defendant by them for medical services and introduced the canceled checks for such services. Thus the prosecution demonstrated that in 132 instances (totaling $5,023.70) either these amounts were entirely omitted or were entered on the defendant's books (from which his tax returns were made up) in very much smaller sums. All of these items were based upon microfilms of canceled checks upon out-of-town banks which the government subpoenaed from the Dyersburg State Bank. But the proofs showed that the Dyersburg State Bank did not keep or make microfilms of local checks.

The defense did not seek to establish the accuracy of the defendant's returns. Basically it contended before the jury, first, that as to the 132 items referred to above, their omission or inaccurate recordation was due to errors of the doctor's bookkeeper. The bookkeeper (defendant's mother-in-law) testified that during the years in question defendant saw 25 to 30 patients daily and that she could have made sufficient errors to account for the $5,000 discrepancy. It was clearly established, however, that the defendant received the fees and made all bank deposits and simply told the bookkeeper of the amount to enter. Defendant did not testify.

The second and principal defense was that because of various deductions (to which it was argued the doctor was entitled) and certain claimed loans during the period in question, the defendant actually owed the government

no tax for the years in question. These claimed deductions and loans were over and above any similar items shown on the defendant's tax return and had not been referred to in those returns. If allowed in total, they would have served to offset the government claim of $6,547.45 tax due.

Of course, we must read the jury verdict as resolving such factual disputes as were presented to it in favor of the government; and as we have noted, defendant submits no appellate issue as to weight or sufficiency of the evidence.

On appeal the argument before this court was begun by appellant's counsel with the frank statement that defendant was an abortionist and that, hence, this court should take great care to see that his procedural rights in this tax evasion case were properly observed—presumably because of the prejudicial effect that the source of his income might have had upon the judge or jury. The fact that income is procured by means which are illegal under state law does not, of course, constitute evidence of violation of federal tax statutes. *Lurding v. United States*, 179 F. 2d 419 (C. A. 6, 1950). But, equally obviously, it does not create any immunity from them either.

As to appellant's issues 4 through 12, based upon the judge's charge as given, or on his failure to give defendant's requests to charge, we find no reversible error. We have reviewed the charge in toto and considered each of defendant's detailed complaints about it. The trial judge was clearly under no obligation to give his instructions in language chosen by one of the contending parties. We believe those matters covered by defendant's request to charge, which should have been made part of the charge, were adequately and fairly set forth to the jury in the charge as given. The charge was full, informative, accurate and balanced and contained in our judgment no error which served to prejudice defendant's case.

Appellant's principal reliance at oral argument was on his first two stated issues, which pertained to two claimed loans from one Eddie Adkins to defendant. At this trial defendant's counsel, without calling Adkins, cross-examined the principal witness for the prosecution on Adkins' previous testimony at the first trial. Over the government's objection, he read into the record an affidavit by Adkins stating that in 1958 he loaned Dr. Moody $5,000 and in 1959 he loaned Dr. Moody $4,000, and that Dr. Moody repaid approximately $1,000 and still owed Adkins $8,000.[1]

With defendant's counsel still cross-examining, there followed this colloquy:

> "Q. Now, you know that Adkins had asserted that he was a crap-shooter and had brought that money back from Burma from gambling in the Army in a money belt?
>
> "Had——
>
> "A. The reason I wanted to hesitate, I thought there was something stated a few minutes ago that I could not testify that Mr. Adkins or anybody else had testified.
>
> "That is all conclusion——
>
> "Mr. McTighe: We have no objection.
>
> "Q. You have hesitated, now, to go ahead and answer. But your lawyers are telling me it can be done, the lead can be done.
>
> "Now, go ahead, answer.
>
> "A. Yes, sir. I didn't want to get in trouble with the Court on hearsay evidence. But to answer your

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[1] We note, of course, appellant's claim of error in the admission of the affidavit when offered by the government. This occurred, however, after appellant's counsel had already read the entire affidavit into the record from a copy and secured agreement from the principal government witness that he had seen same.

question, Mr. Adkins did testify that he did come back from overseas with this money strapped around his waist, and that he didn't let his wife know he had it, and carried it around the country, either around his waist or would stick it in the back of the car, or something, and that, although he was borrowing, he did not let his wife know that he had this money, and that Dr. Moody was a good friend of his, and he loaned it without charging him any interest.

"Q. Well, now, in inquiring as to whether he received that money, did you inquire into his Army record, and find out from anybody that had served with him whether really he was a big gambler on the Lido Road as he had indicated?

"A. No, sir. I did not."

Subsequently defendant's principal witness, an ex-Revenue Agent, testified to a computation of defendant's income which accepted the Adkins loans as non-taxable funds available to defendant in two of the years in dispute. Thereupon, counsel for the government cross-examined him extensively seeking to establish the implausibility of Adkins' story. Much of this cross-examination clearly tended to show investigation by revenue agents of the "Adkins lead" because it consisted of documentary proofs of numerous loans and time payment arrangements entered into by Adkins or his wife during a period when he claimed to have $13,000 to $14,000 cash in his possession. Government counsel also cross-examined defendant's principal witness by asking him about his knowledge of Adkins' handling of his claimed Burma Road bonanza. In this cross-examination counsel for the government frequently sought to read Adkins' testimony at the previous trial (at which the witness had been present) in order to show that the witness knew that Adkins had claimed 1) to have brought the $13,000-$14,000 home from the Burma Road in cash carried in a money belt; 2) to have continued

(apparently most of the time) to carry same in a money belt for the subsequent 20 years; 3) to have (at different times) buried the cash in his backyard and kept it in a wall safe in his G. I. loan financed house, all without his wife knowing anything about his having the money. This procedure of cross-examination was permitted by the trial judge over defendant's counsel's objection on the theory that the reading of the record served to "refresh the recollection" of the witness.

On appeal appellant claims that the trial judge should have granted his request to instruct the jury to allow the Adkins loans because of the government's failure to run down the Adkins lead by investigating military records and seeking possible witnesses to Adkins' Burma Road gambling winnings.

In this regard appellant relies upon *Holland v. United States,* 348 U. S. 121 (1954), where the court said:

> "When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—*leads reasonably susceptible of being checked,* which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished

the Government. It is a procedure entirely consistent with the position long espoused by the Government that its duty is not to convict but to see that justice is done." (Emphasis added.) *Holland v. United States, supra,* at 135-36.

It seems clear to us, however, that the revenue agents met the requirements of this paragraph when the underlined language is taken into account. The detailed investigation of Mr. and Mrs. Adkins' financial affairs in the period immediately preceding the claimed loans of 1958 and 1959 is much more relevant to the validity of the "lead" than a check of a 20-year-old gambling bonanza. This record seems to us to demonstrate a reasonable effort to run down the Adkins' lead. *Buttermore v. United States,* 180 F. 2d 853 (C. A. 6, 1950).

Appellant also claims reversible error in admission of the hearsay evidence just referred to concerning Adkins' first trial testimony. As to this issue appellant's counsel elected not to call Adkins but sought and was granted permission over appellee's objection to introduce Adkins' affidavit. Then counsel for appellant developed (this time without objection) other hearsay from Adkins' testimony at the earlier trial. Appellee claims, of course, that its subsequent cross-examination which developed still more of Adkins' previous trial testimony was only a fair balancing of the advantage which the earlier hearsay had given appellant.

Under the circumstances we have outlined, we have no doubt that some "curative admissibility" was in order. See 1 Wigmore, Evidence, § 15 (3d ed. 1940). With the door opened this widely in favor of appellant, we cannot say that the District Judge's rulings in favor of appellee's proffered hearsay on the same subject was an abuse of judicial discretion or constituted reversible error. *Crawford v. United States,* 198 F. 2d 976 (C. A. D. C. 1952).

Lastly, appellant contends that the United States District Attorney's closing argument contained several improper remarks which constituted prejudicial error and entitled appellant to still another trial.

Appellant's counsel did not interpose objections when the remarks were made and subsequently declined (as a matter of trial tactics) the District Judge's offer to admonish the jury about them.

While all of the remarks objected to might better have been left unmade, only one might approach prejudice requiring a new trial. In summation the Assistant District Attorney said:

> "And I have tried—and the United States Attorney's office has tried in this case to do what we consider to be our duty, to point out to you—to show you these things and say to you that we feel in the light of all this proof that this is one of the worst fraud cases—maybe not in amount because we can't prove everything we may think or feel or believe—but this is one of the worst fraud cases ever been here in this court, based on this type of testimony that has been attempted to use to explain it."

Counsel plainly is not entitled to argue or cite facts or evidence which are not part of the record. *Rommel-McFerran Co. v. Local 369, International Bhd. of Electrical Workers, AFL-CIO,* 361 F. 2d 658, 661 (C. A. 6, 1966).

But in this case appellees proved substantial unreported and unexplained income. The reference could have been to the fact (established by the record) that the Dyersburg State Bank's failure to keep local checks had prevented identification of the sources of some of this income.

Whether this is so or not, we do not believe that this was a close case (*United States v. Rayborn,* 310 F. 2d 339

(C. A. 6, 1962)), or on this total record that the comment amounts to error so prejudicial that this defendant was deprived of a fair trial. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

We, of course, do not have before us the probation report which was available to the United States District Judge prior to sentence to ascertain whether or not a prior felony record justified the administration of the maximum concurrrent sentences of imprisonment in this case. Absent such a record, it appears to us that sentences totaling less than half of the sentence actually imposed would satisfy the federal interest in the violation of its tax laws detailed herein.

In *United States v. West Coast News,* this court said:

> "Upon a mandate going down on the affirmance of the conviction of these defendants, it will be within the power of the District Judge under Rule 35 of the Federal Rules of Criminal Procedure to reduce the prison sentences imposed. He can do this *sua sponte* without command from us or motion by defendants. Because of this, we need not now announce whether we consider that the District Judge abused his discretion in imposing the involved sentences, whether we consider that today's law permits us to change such sentences, or whether we consider that the sentences imposed by the District Judge offend the Eighth Amendment proscription of cruel and inhuman punishment. There will be time enough for us to further consider the matter should the District Judge conclude not to adopt our suggestion as to reduction of the sentences." *United States v. West Coast News Company,* 357 F. 2d 855, 865 (C. A. 6, 1966).

We affirm this conviction and remand the case to the District Court for its reconsideration of the prison sentences in the light of this opinion.

APPENDIX "B".

United States Court of Appeals
For the Sixth Circuit.

No. 16,862.

United States of America,
Plaintiff-Appellee,

vs.

John Burton Moody,
Defendant-Appellant.

Before: Edwards and Celebrezze, Circuit Judges, and Kalbfleisch, District Judge.

Judgment.

Appeal from the United States District Court for the Western District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the case is remanded to the District Court for its reconsideration of the prison sentences in the light of the opinion.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

A True Copy.

Attest:

Carl W. Reuss, Clerk.

Issued as Mandate:

Costs: None

Filing fee .....$ - - -

Printing .....$ - - -

Total .....$ - - -

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1097

JOHN BURTON MOODY, M. D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a trial by jury, petitioner, a physician, was convicted on all four counts of an indictment, returned on April 24, 1963 (R. 3a-6a),[1] charging him with wilfully attempting to defeat and evade his in-

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[1] Record references followed by "a" are to Appellant's Appendix in the court of appeals, those followed by "b" to the Appendix in the Brief of the United States in that court.

come taxes for 1956, 1957, 1958 and 1959 by filing false returns for those years, in violation of Section 7201 of the Internal Revenue Code of 1954. He was sentenced to pay fines totalling $6,000 and to serve concurrent terms of five years imprisonment on each count (R. 154a-156a). The court of appeals affirmed the conviction (Pet. 27-36).[2]

The decision below is correct and no issue of general significance, or conflict between circuits, is presented. Further review is accordingly not warranted.

1. Office records prepared from original entries made by petitioner on his patient cards, when compared with the testimony of the patients, disclosed 132 instances in which the fee was understated on the card. The total amount thus concealed was $5,023.70. (Pet. 29.) However, the cards—which were destroyed every six months—were not available to the investigating agents (R. 8b), and they therefore reconstructed petitioner's income by an analysis of his bank account. By this method,[3] the government

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[2] At the same time it remanded the case to the district court for reconsideration of the sentence. The court of appeals —which lacked access to the pre-sentence investigation report—felt the sentence might be excessive (Pet. 36).

[3] See Schmidt, *Legal and Accounting Handbook of Federal Tax Fraud* (1963), p. 305: "The basic elements of the bank deposit method of determining income * * * consist of a showing: (1) that the taxpayer was engaged in an income producing business or calling; (2) that he made periodic deposits of funds into bank accounts, and (3) that an adequate investigation of the deposits was made by the investigating agents in order to negative the likelihood that the deposits arose from some non-taxable source."

proved—beyond dispute, as the court of appeals noted—that petitioner had "$33,793.13 of taxable income for the four years in question, whereas defendant's returns for those years showed a total of $10,363.40." (Pet. 29.)

During the investigation, petitioner reviewed his borrowing record with the investigating agent and stated that all his financing had been "done at the bank * * * and that as of that date he did not owe any money on any notes payable" (R. 7b). Subsequently, in the course of a conference with representatives of the Department of Justice, petitioner's representatives submitted an affidavit of one Eddie Adkins, dated February 11, 1963 (R. 107b), which stated:

> In August of 1958 I loaned Dr. John Moody $5,000 in cash, as he needed some money to send his sons to school that fall.
>
> In August of 1959 I loaned Dr. Moody $4,000 in cash for the same purpose.
>
> He has repaid approximately $1,000.00 of this $9,000.00 and still owes me approximately $8,000.00.

The agent was advised of this affidavit by the Department of Justice just prior to the indictment, and he thereupon conducted a further investigation (R. 25a, 26a, 28a, 29a, 58a; Pet. 34.)

Eddie Adkins testified as a defense witness in the first trial of this case, which resulted in a conviction that was reversed on appeal because of erroneous rulings by the trial judge (339 F. 2d 161). He was

not called as a witness by either party at the second trial, but his prior testimony was developed, first by petitioner's cross-examination of the investigating special agent, and then, further, by the government's cross-examination of petitioner's accounting witness.

In cross-examining the investigating agent, petitioner's counsel read the contents of the Eddie Adkins affidavit into the record (R. 27a), on the theory that he was demonstrating a "lead" known to the agent prior to trial (R. 22a-23a, 46a, 48a, 50a). The government, on redirect examination of this agent, interrogated him as to his investigation of the affidavit and introduced it into evidence (R. 28a-29a; Pet. 31, fn.). In turn, petitioner's counsel, on recross-examination, elicited testimony from the agent as to Adkins' testimony in the first trial.[4]

An accountant testified on behalf of petitioner that he had spent two months investigating petitioner's tax liabilities, had heard the testimony of all witnesses in the first and second trials and considered all exhibits (R. 37a, 40a), and had computed peti-

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[4] "Q. Now, you know that Adkins had asserted that he was a crap-shooter and had brought that money back from Burma from gambling in the Army in a money belt?

* * * *

A. * * * Mr. Adkins did testify that he did come back from overseas with this money strapped around his waist, and that he didn't let his wife know he had it, and carried it around the country, either around his waist or would stick it in the back of the car, or something, and that, although he was borrowing, he did not let his wife know that he had this money, and that Dr. Moody was a good friend of his, and he loaned it without charging him any interest." (R. 30a).

tioner's income by both the bank-deposit and net-worth methods (R. 38a-40a), taking into consideration the alleged Eddie Adkins "loans" (R. 48a, 66a-67a). The accountant was cross-examined as to testimony of Adkins in the first trial that he had taken a note from petitioner secured by petitioner's office equipment (R. 52a), that his home and everything he possessed had burned up (R. 53a), that he had won, and brought back, some $13,000 to $14,000 from gambling on the Burma Road in World War II (R. 54a), and that he had kept this money in a money belt unbeknownst to his wife (R. 58a). Petitioner's accountant was further cross-examined as to Adkins' borrowing record, which included automobile, house, and numerous small personal and appliance purchase loans (R. 57a-64a).

2. a. Petitioner's contention (Pet. 9-17) that the government failed to verify the Adkins loans and that he was therefore entitled, as a matter of law, to have them considered as true is plainly without merit. The "lead-check" rule of *Holland* v. *United States*, 348 U.S. 121—assuming its applicability to reconstruction of income by the bank deposits method—is limited to "leads [furnished by the taxpayer] reasonably susceptible of being checked * * *" (348 U.S. at 135-136). The lower courts have not imposed an impossible burden on the government. See *United States* v. *Procario*, 356 F. 2d 614, 617 (C.A. 2), certiorari denied, 384 U.S. 1002 (acquittal not required by letter and witnesses' affidavits submitted to Department of Justice "on the eve of indictment"); *Brodella* v. *United*

States, 184 F. 2d 823, 826 (C.A. 6) (reinvestigation of new and contradictory contentions not required); *Kampmeyer* v. *United States*, 227 F. 2d 313, 317 (C.A. 8), motion for leave to file petition for writ of certiorari denied, 351 U.S. 904 ("vague" and "empty" assertions of prior hoards of money); *Mighell* v. *United States*, 233 F. 2d 731, 734 (C.A. 10), certiorari denied, 352 U.S. 832 (agents not required to interrogate taxpayer's son in military service about his alleged knowledge of buried hoard).[5] Under the cited decisions, it is doubtful the government had any duty to investigate Adkins' alleged gambling successes on the Burma Road many years previously. In any event, however, the lead was not ignored. The agent conducted a detailed investigation into Adkins' financial ability during the years 1958 and 1959 (Pet. 34), and the record shows that Adkins appeared before the grand jury which returned the indictment (R. 29a).[6] Moreover, the jury was in-

[5] The cases cited by petitioner (Pet. 9-14) do not take a contrary approach. *Merritt* v. *United States*, 327 F. 2d 820 (C.A. 5), held only that the government's net-worth computation failed where the investigating agent had failed to list and account for additional assets of which he admittedly had knowledge. *Lenske* v. *United States*, C.A. 9, decided October 5, 1966, 66-2 U.S.T.C. ¶ 9686, 18 A.F.T.R. 2d 5815, held only that the net-worth computation used in that case fell short of proving beyond a reasonable doubt that additional tax was due, because the proven deficiencies varied greatly from the deficiencies alleged and because speculative depreciation formulae had been relied on.

[6] It is plain that the trial judge's comment that the investigating agent "did not make any attempt to run that down, didn't consider it—in effect, didn't consider it a reasonable thing to do" (R. 48a) was addressed solely to the

structed (R. 50a-51a; 57b) that it was entitled to consider the government's obligation to follow up leads, whether furnished by the defendant or by others.

b. Petitioner's contention (Pet. 17-23) that the prosecutor's argument exhibited an "obvious motivation * * * to take advantage of the fairly general belief about petitioner's abortion practice" is not supported by the record. Only defense counsel referred in argument to "the general atmosphere" and "this terrible atmosphere," and to his client as "a somewhat unpopular individual" who might have done "some bad things that other people wouldn't do" (R. 86a, 92a, 94a). Petitioner made no timely objection to the prosecutor's rebuttal argument of which he now complains, and he informed the trial court he would not request any curative action by the court (R. 135a). Nor does the record show any request for a change of venue. And, as the court of appeals noted (Pet. 35), the prosecutor's concluding remark about not being able to prove "everything we may think or feel or believe" (R. 106a) might well have referred merely to the government's inability to identify income represented by local checks for which the bank kept no microfilm record.

c. There is no merit to petitioner's contention (Pet. 6-9) that the court's charge might have led the jury

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testimony of the agent (R. 30a) giving a negative response to counsel's question on cross-examination, "Well, now, in inquiring as to whether he received that money, did you inquire into his Army record, and find out from anybody that had served with him whether really he was a big gambler on the Lido Road as he had indicated?"

to believe that it could convict for failure to report income even if no additional tax was in fact due, in view of the many cautionary remarks of the judge on this question.[7]

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[7] The district court's charge informed the jury that the indictment was for willfully attempting to defeat and evade the payment of income taxes (R. 107a); that the government contended that petitioner attempted to evade taxes by filing returns which did not show his true income and did so with intent to evade tax liability (R. 108a), and that the case was an appropriate one for assessing penalties for willful attempt to defeat tax obligations (R. 110a); that filing a false return would be evidence of willful evasion if done in an attempt to evade petitioner's "tax liabilities, or any substantial part or parts of same" (R. 114a); that the offense charged required knowledge of a taxable income and a false return filed in an attempt to evade the tax or a substantial portion of it (R. 116a-117a, 119a); that the government's proof of tax deficiency would be sufficient if it showed that a substantial portion of petitioner's tax liability was not reported (R. 121a); that a "willful" attempt required an "intent to deprive the government of the tax imposed by law and which it was the duty of the taxpayer to pay to the government" (R. 117a); that willfulness required a "wrongful intent" which involved "knowledge of his tax obligations and * * * knowledge that such obligations exceed the amount being reported by him in his returns" (R. 117a); and that mere knowledge that one has income he does not report or pay tax on is not itself sufficient to constitute a violation (R. 117a-119a).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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